Supreme Court, U.S.
FILED
06-454 SEP 25 2006
OFFICE OF THE CLERK

No. ———

In the Supreme Court of the United States

WILLIAM F. HEGGER,

Petitioner,

v.

VISTEON AUTOMOTIVE SYSTEMS, INC., and FORD MOTOR CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did not the Sixth Circuit panel err in holding that the record supported an award of discretionary expenses of litigation to the defendant?

A LIST OF ALL PARTIES TO THE PROCEEDING AND AFFILIATIONS AS REQUIRED BY SUPREME COURT RULE 29.6

All parties involved are named in the caption. There are no parent companies nor any nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication.

CONCISE STATEMENT OF THE BASIS OF THE JURISDICTION OF THE UNITED STATES SUPREME COURT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on June 30, 2006.

2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.

3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari in that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit. The statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the petitioners to be 28 U.S.C. § 1252 .

4. In that neither the United States nor any department thereof is a party to these proceedings, the provisions of Supreme Court Rules 29.4[b] and [c] are not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Federal Rule of Civil Procedure 54[d][1]: JUDGMENTS; Costs

[d][1] Costs Other Than Attorney's Fees. Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

CONCISE STATEMENT OF THE CASE

Federal jurisdiction in the United States District Court for the Middle District of Tennessee was founded on 28 U.S.C. § 1331, in that this is a suit for money damages occasioned by racial discrimination in violation of Title VII. William Hegger went to work for these defendants at the Nashville Automotive Glass Plant in 1996 The racial discrimination relevant to the case *sub judice* involves both direct discrimination, largely distinctions of discipline, and a hostile work environment evidenced principally by racial epithets. Merely by way of example, Mr. Hegger suffered an ersatz application for work with Rev. Jesse Jackson and a Ku Klux Klan card put in his personal workspace provide a vivid but by no means complete example of just exactly how truly hostile the plaintiff's work environment was. The hostile work environment aspect of this matter was a continuing issue. In Mr. Hegger's judgment, white employees were treated

differently - less severely - in matters of employee discipline than he, and other African-American employees. Given these facts, both the District Court and the Sixth Circuit erred in holding that summary judgment was appropriate. These matters are more fully addressed in separate Petition for the Writ of Certiorari, to which reference is hereby made. Moreover, the District Court and the Sixth Circuit compounded their respective errors in awarding the defendant discretionary costs. The motion for summary judgment should not have been granted, and in any case the courts in question abused their respective discretion in awarding discretionary costs.

REASONS FOR GRANTING THE PETITION

At the outset, one must observe that discretionary costs are available only to the "prevailing party." Here, at least as of now, the defendant/appellee prevails. But, the Sixth Circuit's affirmance of the trial judge's grant of summary judgement is the subject of a separate, pending application for *certiorari*. Should that application be granted, the instant application will necessarily be consolidated and the matter of costs readily determined in the same proceeding.

The Sixth Circuit's Opinion clearly treats taxation of costs to the losing party as being tantamount to mandatory, which they emphatically are not. To begin with, one must read Rule 54[d][1] in its plain language: "unless the court otherwise directs." The appellate tribunal was under no greater obligation to tax these costs against Mr. Hegger than was the trial court, which is to say, no obligation at all. The matter is entirely discretionary. *See, e.g.* 6 J. Moore, W. Taggart, & J. Wicker, *Moore's Federal Practice* ¶ 54.7[2]. The Sixth Circuit has noted the discretionary nature of the remedy as recently as June of 2004. *Sutter v. General Motors*

Corporation, 100 Fed. Appx. 472 at Opinion p. 3 (6th Cir. 2004).

Notably lacking from the record in this case is any exploration by any tribunal of the comparative financial firepower of the parties. As the record reflects, the now-victorious defendant is a large, Ford-related corporation, whereas Mr. Hegger is a minority disabled former auto worker. Disparity of financial power, and specifically a losing party's limited financial resources, have been expressly recognized as sound reasons for a federal court to refuse to award costs to a prevailing party. *Nat'l. Org. For Women v. Bank of Cal.,* 680 F.2d 1291 at 1294 (9th Cir. 1982). Even given the overwhelming disparity suggested by the record, the Sixth Circuit made not the slightest effort to compare or contrast. Under the circumstances presented by this case, that was an error of law functionally equivalent to an abuse of discretion.

CONCLUSION

For these reasons, concepts of fundamental fairness require that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-6530

[Filed June 30, 2006]

WILLIAM F. HEGGER,	)
Plaintiff-Appellant	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, INC.	)
And FORD MOTOR Co.,	)
Defendants-Appellees	)
	)
UNITED AUTO WORKERS	)
INTERNATIONAL; UNITED AUTO	)
WORKERS LOCAL 737,	)
Defendants	)
	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
03-00657
William J. Haynes, Jr., U.S. District Judge

Before: SILER, GRIFFIN, Circuit Judges; COOK, District Judge.*

ORDER

William F. Hegger, a Tennessee resident represented by counsel, appeals a district court order awarding costs to the prevailing defendants. The parties have waived oral argument and the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

On January 3, 2005, the district court granted summary judgment to the defendants. Hegger appealed that decision which we affirmed in case 05-5256. on February 1, 2005, the defendants filed a bill of costs for $4,212.70. On February 4, 2005, the clerk of the district court entered a notice of refusal to consider the bill because the bill omitted a date and time certain for presentation to the clerk as required by the district court's Local Rule 13(d). On February 8, 2005, the defendants filed a motion for review of the clerk's denial with a supporting affidavit. On February 11, 2005, the district judge granted defendants' motion finding that the deficiency in the bill had been cured.

On March 21, 2005, Hegger filed a response to the defendants' motion for review. On May 13, 2005, the clerk taxed costs against Hegger in the sum of $3,842.70.

Hegger filed two additional motions objecting to the taxation of costs. The objections were overruled and the district court affirmed the award of costs.

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* The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

On appeal, Hegger argues that his due process rights were violated when the defendants were awarded costs as the bill was submitted as incomplete under the district court's local rules and the bill was not corrected until after time to do so had run.

The district court's determination granting defendants' request for costs is reviewed for an abuse of discretion. *See Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 835 (6th Cir. 2005). A reviewing court finds an abuse of discretion when it reaches a firm and definite conviction that the trial court committed a clear error in judgment. *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578-79 (6th Cir. 1998).

Fed. R. Civ. P. 54(d)(1) provides that the losing party should pay the prevailing parties costs: "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ." Hegger asserts that because the defendants made a clerical error in their bill of costs by omitting a date and time certain as required by a local court rule, his due process rights were violated. No such requirement exists in Rule 54(d)(1). Hegger was notified of the demand which the defendants documented. The defendants' clerical error did not violate Hegger's due process rights or Rule 54(d)(1). As Rule 54(d)(1) entitles the defendants to their costs and Hegger is liable for those costs, the district court's decision to grant defendants costs was not an abuse of discretion.

Accordingly, we affirm the award of costs.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5256

[Filed June 2, 2006]

WILLIAM F. HEGGER,	)
Plaintiff-Appellant	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, INC.	)
And FORD MOTOR Co.,	)
Defendants-Appellees	)
	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
03-00657
William J. Haynes, Jr., U.S. District Judge

Before: SILER, GRIFFIN, Circuit Judges; COOK, District Judge.*

* The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COOK, District Judge. The Plaintiff-Appellant, William F. Hegger, appeals the grant of a summary judgment by the district court in favor of the Defendants-Appellees, Visteon Automotive Systems, et al. On the basis of the record, we affirm the entry of the summary judgment and deny Hegger's appeal.

I.

On July 22, 2003, Hegger filed a complaint in the United States District Court for the Middle District of Tennessee, in which he accused his employers, Visteon Automotive Systems, and the Ford Motor Company, as well as his union, United Auto Workers International, of (1) race and age discrimination, (2) racial harassment and hostile work environment, (3) acts of retaliation in the form of disparate measures of discipline, (4) a deliberate failure to hire and/or promote him in violation of existing law, and (5) an undeserved constructive discharge from his employment.[1]

On January 3, 2005, the district court granted Visteon's motion for the entry of a summary judgment after concluding that Hegger had failed to proffer a sufficiency of evidence upon which to support his claims of disparate treatment under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-401 et seq ("THRA"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 and 623(d)("ADEA"). The district

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[1] In 2000, Visteon became a wholly owned subsidiary of the Ford Motor Company. Hegger and other hourly employees of Ford at the time of this corporate realignment were loaned to Visteon.

court also determined that his Title VII discriminatory claims neither occurred within the applicable limitations period nor were supported by any set of facts which would be sufficient to satisfy a judgment under Title VII, the THRA, or the ADEA. This appeal followed.

II.

Hegger, an African American, began his employment with the Ford Motor Company in 1996 at its Glass Plant facility in Nashville, Tennessee. During the course of his employment, he filed two charges of unlawful racially discriminatory conduct by his employers with the Equal Employment Opportunity Commission ("EEOC"); one in 1998 and the other in 2002. When Hegger filed his first EEOC charge in 1998, he detailed a series of incidents between August 26, 1996 and February 7, 1998 which served as the bases for his complaints.[2] Although he was issued a right-to-sue letter by the EEOC, no lawsuit was ever filed by him within the designated statutory framework. In 2002, Hegger filed another charge with the EEOC, contending that his employers had subjected him to unlawful employment decisions on the basis of his race and age.

During the period of time between the filing of these two EEOC charges, Hegger had been disciplined by his employers on three separate occasions for absenteeism. There was also evidence presented to the district court that the human

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[2] The incidents that were referenced by Hegger in the 1988 EEOC charge included his receipt of, among other things, (1) an unwanted handwritten card from the Ku Klux Klan, and (2) unsolicited sexually explicit jokes from some unidentified co-workers.

resources personnel department ("HRPD") had received complaints from fellow-employees which indicated that Hegger had exhibited some strange and inappropriate behavioral patterns in and around the workplace. As a consequence, he was (1) placed on paid medical leave in accordance with the collective bargaining agreement and (2) required to undergo a psychological exam. Upon returning to work, Hegger attended a disciplinary hearing, in which he was assessed a thirty day suspension.[3]

III.

As an appellate court, we must review the entry of a summary judgment by utilizing a *de novo* standard of review. *See Kocak v. Community Health Partners of Ohio,* 400 F.3d 466, 468 (6th Cir. 2005); *Farhat v. Jopke,* 370 F.3d 580, 587-88 (6th Cir. 2004). However, the "summary judgment will be affirmed if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact' as to an essential element of the non-moving party's case." *Farhat,* 370 F.3d 580, 587 (6th Cir. 2004)(quoting Fed.R.Civ.P. 5(c)). "An issue of fact is 'genuine' if a reasonable person could return a verdict for the non-moving party." *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Finally, "the party bearing the burden of proof must present a jury question as to each element of its case." *Sharma v. Ohio State University,* 25 Fed. App'x. 243, 246 (6th Cir. 2001).

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[3] Inasmuch as Hegger had already incurred a thirty day paid leave, it was treated as "time served" which enabled him to resume his work immediately.

Although Hegger timely filed this lawsuit on the basis of his claims arising out of the 2002 EEOC charge, these allegations improperly included incidents that had been a part of the 1998 EEOC charge. As such, we will only review Hegger's disparate discipline claims under Title VII and THRA by utilizing the traditional summary judgment framework.[4]

IV.

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminating against any individual . . . because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2. In 2001, we declared that the "plaintiff in a Title VII case bears the initial burden of proving discrimination by the defendant." *Sharma v. Ohio State University*, 25 Fed. App'x. 243, 246 (6th Cir. 2001). Thus, a Title VII plaintiff may "satisfy this burden by presenting direct evidence of discrimination actions by the defendant or by showing the existence of circumstantial evidence that creates an inference of discrimination." *Id.* at 247.

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[4] In Hegger's brief, he stated, "Appellant's claims . . . are predicated on [Title VII]. For the purposes of this appeal, William Hegger takes no position on the dismissal of his ADEA and Family Medical Leave Act ("FMLA") claims. [However,] pendent jurisdiction for plaintiffs claims under [the THRA] also attaches." Appellant Br. 7. Although not entirely clear from a reading of his brief, it appears that Hegger is only challenging the summary judgment decision by the district court as it relates to his Title VII and THRA claims.

1. Direct Evidence

In a direct evidence case, the plaintiff must present "direct testimony that the employer acted with a discriminatory motive." *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 172 (6th Cir. 2004). Direct evidence requires a conclusion by the fact finder that unlawful discrimination was at least a "motivating factor" for the employer's actions. *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 114-15 (6th Cir. 1987). If the plaintiff is successful in demonstrating the existence of unlawful discriminatory conduct by the employer, the burden of persuasion shifts to the defendant to show that the challenged employment tenure would have been terminated even if it had not been motivated by discrimination. *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999).

In this case, Hegger is unaware of the identity of those persons who, in his judgment, are responsible for the alleged discriminatory conduct at his workplace. Moreover, Hegger has been unable to present any evidence which links the decisions by management to the conduct about which he has complained. Although he contends that the thirty-day suspension for his alleged bizarre behavior was the product of a racial animus, it appears from the record that the employer proffered a facially legitimate business reason for its administrative action. Rather than imposing another thirty day suspension period upon him, the company essentially considered his medical leave as "time served." Contrary to Hegger's position on this issue, it suggests that his employer was accommodating and displayed sensitivity under these circumstances.

Consequently, we conclude that Hegger has failed to establish that (1) an act of unlawful discrimination was at least

a motivating factor in his employer's decision to administratively discipline him or (2) the company acted with a discriminatory motive. Accordingly, Hegger has failed to proffer any direct evidence of illegal discriminatory conduct by Visteon.

2. Circumstantial Evidence

In order to survive the entry of a summary judgment in a Title VII claim through the use of circumstantial evidence, the plaintiff must show that he (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified, and (4) was treated less favorably than a similarly situated employee outside the protected class. *Sharma,* 25 Fed. App'x at 247. "Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant does so, the burden shifts back to the plaintiff to prove the reason advanced is pretextual." *Id.* (citations omitted). Those claims that arise under the THRA "are analyzed under the same framework as those under Title VII." *Rhea v. Dollar Tree Stores, Inc.,* 395 F. Supp. 2d 696, 2005 WL 2600213, at 7 (W.D. Tenn. 2005)(citing *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 31 (Tenn. 1996)).

As a preliminary matter, Hegger's Title VII allegations are limited to those claims that were asserted by him in his 2002 EEOC charge because he neglected to exercise his right to file a law suit under the 1998 EEOC charge in a timely

manner.[5] *See* 42 U.S.C. § 2000e-5(f)(1); *Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Significantly, Hegger has not argued that his 1998 EEOC charge falls under any of the recognized exceptions to the statute of limitations. Moreover, he does not contend that the allegations within the 2002 EEOC charge constitute a "continuing violation" of the 1998 EEOC charge. *See Valentino v. United States Postal Serv.*, 218 U.S. App. D.C. 213, 674 F.2d 56, 65 (D.C. Cir. 1982)(to demonstrate continuing violation, plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period").

Accordingly, in light of the facts and circumstances surrounding the 2002 EEOC charge, it is clear that Hegger has not established any viable claim under Title VII. *See Gerlach v. Michigan Bell Telephone Co.*, 501 F. Supp. 1300, 1322 (E.D. Mich. 1980)("the claims in the judicial complaint must be like or related to the allegations contained in the EEOC charge"). The 2002 EEOC charge contains an assertion that his employer undertook retaliatory measures against him during a six week period (September 1, 2002 and October 20, 2002) on the basis of his race. Hegger's allegation of disparate discipline are legally and factually deficient.

In pursuit of this issue, Hegger submits that "appellate courts construing Rule 56 standards consistently hold that where, as here, the outcome hinges squarely on state of mind,

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[5] Although the district court based its summary judgment decision, in part, on this issue, Hegger neither challenged nor addressed this point in his appeal.

or intent, or perception, or witness credibility, summary judgment should not be granted." However, he has neglected to proffer *any* evidence which would suggest that his employer acted in a discriminatory manner. Despite having claimed that white co-workers were treated differently from him, he has been unable to identify any white fellow employee who, though similarly situated, was treated differently.

Even if Hegger had satisfied the prima facie requirements of a Title VII violation, he has not asserted any argument that would rebut his employer's nondiscriminatory reasons for the adverse employment action which addressed his absenteeism record, as well as the complaints from fellow-employees about his questionable behavior while in the work place. In fact, Hegger has acknowledged that he did not have his supervisor's permission to leave the plant on any of the three occasions for which he was disciplined. It is our conclusion that the discipline enacted against Hegger was in accord with the progressive policy of the plant for attendance. It is important to note that de minimis employment actions are not materially adverse and, thus, they are not actionable. *Ford v. GMC*, 305 F.3d 545, 553 (6th Cir. 2002). The imposition of discipline against an employee for absenteeism according to company policy is not a materially adverse employment action. *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000)(*de minimis* loss of pay did not rise to level of adverse employment action). Therefore, a review of the facts which surround the relevant events suggests that each action taken by Visteon was warranted.[6]

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[6] Although Hegger's brief is not clear as to whether he has conceded his hostile environment claim under Title VII, we have concluded that this allegation should fail for the same reasons given

A. Retaliation Claim

In order to establish a prima facie case of unlawful retaliation under Title VII, a plaintiff must demonstrate, by a preponderance of the evidence, that (1) this statute protects the activity in which he was engaged, (2) his employer knew that he was engaged in this protected activity, (3) an employment action, which was adverse to the plaintiff was undertaken by his employer, and (4) there exists a causal connection between the protected activity and the adverse employment action. *Abbott v. Crown Motor Co. Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Hegger has not offered any evidence which suggests that he was engaged in a protected activity. As a consequence, Hegger's retaliation claim must necessarily fail.

V.

In noting that Hegger has not set forth any evidence - direct or circumstantial - which satisfies the disparate discipline framework, this Court agrees with the decision by the district court to grant a summary judgment in favor of the employer because we also believe that there are no genuine issues of a material fact to be resolved. Accordingly, and for the reasons that have been set forth above, we affirm the decision of the district court in this litigation.

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above. *See Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696, 2005 WL 2600213, at 4 (W.D. Tenn. 2005).

APPENDIX C

UNITED STATES COURT DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:03-0657

[Filed September 7, 2005]

WILLIAM F. HEGGER,	)
Plaintiff	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, et al.	)
Defendants	)
	)

ORDER

The motion is DENIED. The effective date is the date of the filing of the first bill of costs that was timely under the Local Rule.

/s/
WILLIAM J. HAYNES, JR.
United States District Judge
Dated 9-7-05

APPENDIX D

UNITED STATES COURT DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:03-0657

[Filed January 3, 2005]

WILLIAM F. HEGGER,	)
Plaintiff	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, INC.,	)
a/k/a VISTEON CORPORATION FORD	)
MOTOR COMPANY, UNITED AUTO	)
WORKERS INTERNATIONAL,	)
UNITED AUTO WORKERS LOCAL 737,	)
Defendants	)
	)

ORDER

Plaintiff, William F. Hegger, filed this action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*, the Tennessee Human Rights Act ("THRA"), Tenn. Code. Ann. § 4-21-401 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 and 623(d) and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 1985. The Defendants Visteon

Automotive Systems, Inc., a/k/a Visteon Corporation Ford Motor Company, United Auto Workers International and United Auto Workers Local 737 (the "Union Defendants"), are respectively Plaintiff's former employer and his union at that employment. The Unions Defendants were dismissed by separate Order. (Docket Entry No. 50).

Before the Court is the Defendant Visteon's motion for summary judgment (Docket Entry No. 30) to which Plaintiff has responded. With few objections as to the relevance and the three objections to non-material facts, the Plaintiff does not otherwise dispute the Defendant's Statement of Undisputed Facts about the timeliness of certain critical events. The Court therefore adopts as the facts for this motion, Plaintiff's responses to the Defendants' Statement of Undisputed Facts except those to which Plaintiff objected and disputed. (Docket Entry No. 43). The latter assertions are not material.

Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988) (unpublished opinion). As will be discussed *infra*, upon the filing of a motion for summary judgment, the opposing part must come forth with sufficient evidence to withstand a motion for directed verdict, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court concludes that there are material factual disputes, thus, this section does not constitute a finding of facts under Fed. R. Civ. P. 56(d).

In sum, most of the events at issue occurred prior to 1998. Visteon contends that given the undisputed facts and the

charges in Plaintiff's administrative charge filed with the Equal Employment Opportunity Commission ("EEOC"), Plaintiff's Title VII claims either exceed the scope of his charge and are time barred. For the exhausted claim in Plaintiff's 2002, EEOC administrative charge, Plaintiff has not presented evidence to support his claim of disparate treatment under Title VII of the THRA or the ADEA. In his response, Plaintiff argues only that the conduct after 1999 is actionable under 42 U.S.C. § 1981 that has a four years limitations period, citing *Jones v. R&R Donnelley and Sons*, 124 S.Ct. 1836 (2004).

Based upon the undisputed facts and the Plaintiff's response, the Court concludes that Plaintiff's exhausted Title VII claims did not occur within the applicable limitations period and otherwise are not supported by sufficient facts to support a judgment under Title VII, the THRA nor the ADEA.

The record does not establish any claim in Plaintiff's pleadings under 42 U.S.C. § 1981 nor has Plaintiff sought to amend his complaint to assert these claims, despite the Defendants' motion for summary judgment on the untimeliness of Plaintiff's other claims.

Accordingly, the Defendants' motion for summary judgment (Docket Entry No. 30) is GRANTED and Plaintiff's claims against the Defendants Visteon Automotive Systems, Inc., are DISMISSED with prejudice.

This is the ~~Final Order~~ in this action.

It is so ORDERED.

ENTERED this the 3rd day of January, 2005

/s/ _____
WILLIAM J. HAYNES, JR.
United States District Judge

(2)

No. 06-454

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

WILLIAM F. HEGGER,

Petitioner,

v.

VISTEON AUTOMOTIVE SYSTEMS, INC., and FORD MOTOR CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the district court's taxation of $3,842.70 in court costs against the petitioner, notwithstanding the petitioner's contention that the court of appeals failed to consider the comparative financial resources of the parties, when: (1) the petitioner's claims against the respondents were resolved adversely to the petitioner through a summary judgment that was affirmed on appeal; (2) the petitioner failed to argue, in either the district court or the court of appeals, that the comparative financial resources of the parties warranted a departure from the general rule that costs should presumptively be taxed against the nonprevailing party; (3) the petitioner presented no evidence that he suffered from limited financial resources or was unable to pay the costs in question; and (4) the petitioner has otherwise provided no basis for concluding that the court of appeals erred in failing to find an abuse of discretion in the district court's taxation of costs.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption sets forth all of the parties to this case, except that two other entities were defendants (along with the respondents) in the district court: United Auto Workers International and United Auto Workers Local 737. Those entities were not named as appellees when the petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

The corporate respondents have no parent companies. Moreover, no publicly held company owns ten percent or more of either respondent's stock.

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JURISDICTION

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the petitioner, William F. Hegger ("Hegger"), asserted claims against the respondents, defendants in the trial court, pursuant to various federal statutes. R:1; *see* APP:6a.[1] The district court entered summary judgment against Hegger and in favor of the respondents. R:52; APP:16a-19a. The United States Court of Appeals for the Sixth Circuit affirmed that decision. APP:5a-14a. In Case No. 06-299, now pending in this Court, Hegger is requesting that this Court grant certiorari to review that decision.

In the meantime, following the clerk of the district court's taxation of costs against him in the amount of $3,842.70 (R:67, 70; APX:38, 42), Hegger filed a series of motions objecting to those costs. R:69, 71, 73; APX:40-41, 43-44, 46-47. The district court denied the last of those motions through an order entered on September 7, 2005. R:74; APX:48; APP:15a. Hegger filed a notice of appeal on September 26, 2005. R:75; APX:49. Hegger's notice of appeal was timely under rule 4 of the Federal Rules of Appellate Procedure, and the court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The Sixth Circuit's decision affirming the district court's award of costs to the respondents was issued on June 30, 2006. APP:1a-4a. Hegger filed no post-decision

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[1] The record on appeal is cited both as "R:__," according to docket number, and, when possible, as "APX:__," according to page number of the joint appendix that the parties filed with the Sixth Circuit. Hegger's petition is cited as "P:__," according to page number. The appendix to Hegger's petition, setting forth relevant decisions of the court of appeals and the district court, is cited as "APP:__," according to page number.

motions. He filed his petition for certiorari with this Court on September 25, 2006. The petition was timely under rule 13.1 of this Court's rules. Hegger states that this Court's "jurisdiction over the instant controversy" arises under 28 U.S.C. § 1252. P:1. He is mistaken. That statute was repealed in 1988. *See* Pub. L. 100-352, § 1. This Court's jurisdiction actually exists pursuant to 28 U.S.C. § 1254(1).

The respondents agree with Hegger that rule 12.5 of this Court's rules is not applicable to his petition. P:1. The reason for that rule's inapplicability, however, is not, as Hegger says, because his petition is allegedly "predicated on errors made by the United States Court of Appeals for the Sixth Circuit." P:1. Instead, the reason rule 12.5 does not apply to Hegger's petition is simply because he is not a cross-petitioning respondent.

Similarly, although the respondents concur with Hegger that neither rule 29.4(b) nor (c) applies here, the reason is not, as Hegger states, because "neither the United States nor any department thereof is a party to these proceeding." P:1. Rather, the reason that rule 29.4(b) or (c) is inapplicable here is because this case does not draw into question the constitutionality of any federal or state statute.

STATEMENT OF THE CASE

This is a case involving alleged employment discrimination, in which Hegger, the employee, sued the respondents, his employers. *See* APP:6a. On January 3, 2005, the district court granted summary judgment to the respondents on the merits of Hegger's claims. R:52; APP:16a-19a.

Hegger unsuccessfully appealed that decision to the court of appeals. APP:5a-14a. His certiorari petition in which he is seeking review of that decision is now pending before this Court in Case No. 06-299.

Meanwhile, following the summary judgment in their favor, the respondents filed with the district court a bill of costs for $4,212.70. R:55; APX:13; *see* 2a. A few days later, the clerk of the district court entered a notice of refusal to consider the bill because it omitted a date and time certain for presentation to the clerk, as required by a local rule of the district court. R:58; APX:27; *see* APP:2a. The respondents then filed a motion with the district court for review of the clerk's denial of costs. R:59; APX:28; *see* APP:2a. The district court granted that motion, finding that the deficiency in the bill had been cured. R:63; APX:32; *see* APP:2a. In accordance with that order, the clerk taxed costs against Hegger in the amount of $3,842.70. R:67, 70; APX:38, 42; *see* APP:2a.

Hegger filed a series of motions objecting to the costs that had been taxed against him. R:69, 71, 73; APX:40-41, 43-44, 46-47; *see* 2a. The district court overruled all of Hegger's objections and approved the costs awarded to the respondents. R:72, 74; APX:45, 48; *see* APP:2a, 15a. Hegger appealed. R:75; APX:49.

On appeal, Hegger's sole argument was "that his due process rights were violated when the defendants were awarded costs as the bill was submitted as incomplete under the district court's local rules and the bill was not corrected until after time to do so had run." APP:3a. Applying the abuse-of-discretion standard of review, the court of appeals rejected Hegger's argument, noting that an abuse of discretion is presented only when an appellate

court "reaches a firm and definite conviction that the trial court committed a clear error in judgment." APP:3a.

The court of appeals noted the language of rule 54(d)(1) of the Federal Rules of Civil Procedure, which presumptively entitles a prevailing party to the recovery of costs. APP:3a. The court then disposed of Hegger's due process argument as follows:

> Hegger asserts that because the defendants made a clerical error in their bill of costs by omitting a date and time certain as required by a local court rule, his due process rights were violated. No such requirement exists in Rule 54(d)(1). Hegger was notified of the demand which the defendants documented. The defendants' clerical error did not violate Hegger's due process rights or Rule 54(d)(1). As Rule 54(d)(1) entitles the defendants to their costs and Hegger is liable for those costs, the district court's decision to grant defendants costs was not an abuse of discretion.

APP:3a. The decision of the court of appeals issued on June 30, 2006. APP:1a. Hegger did not seek any sort of post-decision relief from the court of appeals.

ARGUMENTS FOR DENYING THE PETITION

Hegger's sole argument is that the taxation of costs against him was an abuse of discretion due to his alleged limited financial resources and the comparative financial disparity between him and the respondents. P:4. According to him, the court of appeals erred because it "made not the slightest effort to compare or contrast" the respective financial resources of the parties. P:4. Hegger's argument

is completely without merit, and he has provided this Court with no basis for granting certiorari.

It is quite true that the court of appeals did not consider the disparity-of-financial-resources argument that Hegger is now making. It failed to do so for the most basic of reasons: Hegger did not make that argument – either in the court of appeals or in the district court. He is making that argument for the first time in the certiorari petition that he has filed with this Court. That factor alone is a sufficient ground for denying Hegger's petition. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (Court does not decide issues in the first instance issues not decided below); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (Court declined to consider issue raised for first time in petition for certiorari).

Nor did Hegger provide either the district court or the court of appeals with any evidence to support his conclusory suggestion that he is unable to pay the rather minimal costs that were taxed against him. Without such evidence of record, the court of appeals would have had no basis for relieving Hegger of the duty to pay costs, even if he had made an argument predicated on his purported financial condition.

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). As this Court has recognized, and as even Hegger acknowledges (P:3), the district court was entrusted with broad discretion in determining the issues concerning the taxation of costs. *See Crawford*

Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987).

Hegger did not demonstrate to the court of appeals that the district court abused its discretion in taxing costs against him. Indeed, it would have been quite unusual if the district court had not done so.

To be sure, "Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Id.* at 442. But that rule "provides that the cost *shall* be taxed against the losing party unless the court otherwise directs." *Id.* at 441. When a district court departs from the general rule and declines to award costs to a prevailing party, the courts of appeals have consistently required the district courts to have an evidentiary basis for doing so and to state their reasons for that departure, so that the courts of appeals can determine whether the district courts acted within their discretion. *See, e.g.*, *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001); *Cantrell v. International Broth. Of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 458-59 (10th Cir. 1995); *Delano v. Kitch*, 663 F.2d 990, 1001 (10th Cir. 1981); *Serna v. Manzano*, 616 F.2d 1165, 1167-68 (10th Cir. 1980); *Constantino v. American S/T Achilles*, 580 F.2d 121, 123 (4th Cir. 1978); *Compania Pelineon De Navegacion, S.A. v. Texas Petroleum Co.*, 540 F.2d 53, 56-57 (2d Cir. 1976).

Here, Hegger provided the district court with absolutely no evidentiary basis – or with any other valid reason – for departing from the presumption that costs are to be taxed against the losing party. And he certainly has not demonstrated that the court of appeals erred in affirming the district court's taxation of those costs – particularly when the argument that Hegger is now making was never pursued before either that court or the district

court.[2] Moreover, Hegger has not given any reason whatsoever why the decision by the court of appeals, even if it were wrong, would be worthy of this Court's certiorari review. *See* S. Ct. R. 10.

What happened here was a typical, standard taxation of costs after a plaintiff lost on the merits. There was no genuine appellate issue for the Sixth Circuit to consider, and there is most definitely no "certworthy" issue for this Court to review either.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny Hegger's petition for a writ of certiorari.

Respectfully submitted,

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[2] The respondents take no position on whether the district court would have abused its discretion if it had denied costs to them based upon Hegger's presentation of evidence of the parties' disparate financial resources. Hegger presented no such evidence, he made no such argument, and the district made no decision of that nature. That question is not presented in this case, and Hegger's citation (P:4) to *National Organization for Women v. Bank of California*, 680 F.2d 1291 (9th Cir. 1982), is therefore irrelevant.